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CHARLES ELMORE CROPLEY
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IN THE

Supreme Court of the United States

No. 348.

Term, 19 .

MARY K. ELLIS,
Petitioner and Appellant Below,

v.

GIRARD TRUST COMPANY, Surviving Trustee Under the Will of GEORGE W. NEVIL, Deceased,
Respondent and Appellee Below.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA AND BRIEF IN SUPPORT THEREOF.

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IN THE

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GIRARD TRUST COMPANY, SURVIVING TRUSTEE UNDER THE WILL OF GEORGE W. NEVIL, DECEASED,
Respondent and Appellee Below.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA.

To the Honorable Fred M. Vinson, Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner, Mary K. Ellis, respectfully petitions this Honorable Court for a writ of certiorari to the Supreme Court of the Commonwealth of Pennsylvania, and respectfully shows:

SUMMARY STATEMENT OF MATTERS INVOLVED.

George W. Nevil, the testator, died October 29, 1930, a resident of Delaware County, Pennsylvania, leaving a will (a copy of which is in the record Vol. 1 P. 5a) by which will, after various devises and bequests he gave his residuary estate to Dimner Beeber (who predeceased him) and Girard Trust Company (now Girard Trust Corn Exchange Bank), in trust to invest and keep invested, and after deducting the proper charges against the trust estate and a reasonable compensation for their services, to pay out of

the net income thereof as follows:—"(1) To Mary A. Kelly" (now Mary K. Ellis, the petitioner and appellant) "the sum of Seven Thousand Dollars monthly so long as she shall live, free and clear of any and all her debts, contracts or engagements, and *after her death* the principal of the said estate, upon which she has been receiving the said monthly sum, shall become part of my residuary estate; (2) To establish and maintain an asylum for the deaf, dumb and blind to be known as the "Nevil Asylum for the Deaf, Dumb and Blind" the said net income to be allowed to accumulate until it reaches a sum sufficient, in the judgment of the Executors and Trustees, to establish and maintain such asylum and the support of the same thereafter to be paid out of the income."

He further provided:

> "All the bequests, legacies and devises herein contained are to be free from *any and all taxes lawfully imposed or to be imposed by the United States Government or any State Government or any municipal authority thereof, which taxes are to be paid by my estate.*"

Mary A. Kelly, the beneficiary aforesaid, survived him, and is the Mary K. Ellis, the appellant. She had been raised by the decedent, his sister, and his five brothers in their household since she was a very small girl, and is now over forty years of age. Testator's brothers and sister all preceded him in death. None of them had ever married or had any children. They all resided together. This testator also died single. He always referred to Mary K. Ellis as his ward and she called him Uncle George. He, Mary K. Ellis and the servants constituted his household. He had set up a style of living and desired that style after his death to be continued by Mrs. Ellis. He calculated the cost thereof and by his will endeavored to provide that she should have sufficient to carry out his wishes. He was a man in his eighties, had been through many tax situations

and their many changes between 1913 and 1931, and hence knew the effect the tax situation might have on the seven thousand dollars a month he calculated his ward must have to live as they had lived and as he wished. He had purchased the two large establishments in which they resided—one in Haverford and one in Ventnor—and given them to her. He kept two large cars, and wished her, and made her promise, after his death to do likewise. She agreed with him she would do so.

The admission of a large part of the appellant's evidence was denied by the trial judge. In affirming the action of the trial judge the Supreme Court of Pennsylvania affirmed this.

Practically Testator's entire estate was invested in municipals, upon the income from which there was no income tax.

After arranging things as he thought he had, he made his will as aforesaid.

The Trustee after his death disposed of a large part of the municipals gradually and reinvested the moneys in taxables. This increased the Estate's income so that after the seven thousand dollars a month was paid to Mrs. Ellis almost $1,000,000 has now accumulated and is held by the Trustee undistributed.

However, as to Mrs. Ellis, the chief object of testator's bounty, the result was a large part of her seven thousand dollars a month has been and is being consumed by income taxes; (see Vol. 1 of the Record P. 77a for figures). She was unable, because thereof, to maintain the homes and do that which he wished her to do and which she had agreed with him to do. She, therefore made a demand upon the Trustee that it pay the income tax on the seven thousand dollars a month under the above provision of the will. The Trial Court first agreed with her and so found. The Trustee thereafter felt the Home should be specially represented by separate counsel, the adjudication was opened and a reaudit held. The trial Court by its second adjudication held

the Trustee was not obliged to pay the tax, and denied her petition. An appeal from this decree was taken to the Supreme Court, which filed two opinions—the majority opinion sustaining the Court below—two of the Justices however dissenting and filing also an opinion. A rehearing was denied. This appeal was thereupon taken.

JURISDICTIONAL STATEMENT.

The jurisdiction of this Court is invoked under Chapter 646 of the Judicial Code of June 25, 1948, 62 Sta. 929, 28 U. S. C. A. 1257.

The petition for rehearing was dismissed and the rehearing denied July 20, 1951.

QUESTIONS PRESENTED.

1. Did the Supreme Court of Pennsylvania by affirming the action of the lower Court deny George W. Nevil (the testator) and Mary K. Ellis (the appellant) due process under the 14th Amendment to the Constitution of the United States by preventing proof of the contract between said George W. Nevil and said Mary K. Ellis (Record Vol. 1, P. 140a) and thus denying the parties a fair hearing?

2. Did the Supreme Court of Pennsylvania by affirming the decree of the lower Court illegally interfere with the contract rights of the parties and thus deny the parties due process under the said Amendment to the Constitution?

3. Did the Supreme Court of Pennsylvania by affirming the decree of the said Court below deny George W. Nevil and said Mary K. Ellis due process under the 14th Amendment to the Constitution of the United States and by impairing contract obligations between said George W. Nevil and said Mary K. Ellis, and said George W. Nevil and the Trustee under his will for the benefit of Mary K. Ellis, the beneficiary?

4. Did the Supreme Court of Pennsylvania by affirming the decree of the Court below deny the due process guar-

anteed by the 14th Amendment to the Constitution by taking Mary K. Ellis' property (money and contract rights) and giving the same to the Trustee or the Charity or the Government without just cause?

5. Did the Supreme Court of Pennsylvania by affirming the decree of the lower Court deny the testator his right to lawfully dispose of his property in any manner he wished?

6. Did the Supreme Court of Pennsylvania deny the said George W. Nevil his inalienable right to make a will disposing of his property as he wished?

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT.

1. The Supreme Court of Pennsylvania has decided important questions contrary to the Fourteenth Amendment to the Constitution of the United States, and the decisions of this Court.

2. The Supreme Court of Pennsylvania in affirming the decree of the lower Court has denied the defendant due process of law contrary to the 14th Amendment to the Constitution of the United States by the exclusion of the testimony of an important witness (Record Vol. 1, Pp. 140a, 141a).

3. The Supreme Court of Pennsylvania by preventing proof of the contract between decedent and appellant denied the appellant a fair hearing guaranteed by the Constitution.

4. The Supreme Court of Pennsylvania by affirming the decision of the trial Court denied appellant the due process guaranteed by the Fourteenth Amendment to the Constitution of the United States inasmuch as it impairs contract obligations between decedent and beneficiary and between decedent and trustee for the benefit of beneficiary.

5. The decision of the Supreme Court of Pennsylvania denies the appellant due process under the Fourteenth

Amendment to the Constitution of the United States because it takes the beneficiary's property (being money and contract rights), and gives it to the trustee or the charity without just compensation.

6. The decision of the Supreme Court of Pennsylvania denies the testator the right to legally dispose by will of his property—which is contrary to the Fourteenth Amendment to the Constitution of the United States.

PRAYER FOR WRIT.

Wherefore your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the Supreme Court of Pennsylvania, commanding said Court to certify and send to this Court for its full review a full and complete transcript of the record and the proceedings of the said Supreme Court of Pennsylvania in the case at bar, and entitled on its docket as "No. 29—Estate of George W. Nevil, Deceased,—Appeal of Mary K. Ellis—Appeal from the definitive Decree of the Orphans' Court of Delaware County as of July Term, 1931, No. 22," to the end that this cause may be reviewed and determined by this Court as provided by the Statutes of the United States; and that the judgment herein of the said Supreme Court of Pennsylvania may be reviewed by this Court, and for such further relief as this Court may deem proper.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINIONS BELOW.

The original opinions of the Supreme Court of Pennsylvania, both majority and minority, are reported in 367 Pa. Page 30.

The subsequent orders are not reported but are set forth in the Record on Pages 597 et seq.

JURISDICTIONAL STATEMENT.

The jurisdiction of this Court is invoked under Chapter 646 of the Judicial Code of June 25, 1948, 62 Sta. 929, 28 U. S. C. A. 1257.

The petition for rehearing was dismissed and the rehearing denied July 20, 1951.

STATEMENT OF THE CASE.

George W. Nevil died on October 29, 1930, at the age of 83, a resident of Delaware County, Pennsylvania, leaving a will, by which will he, after various devises and bequests, provided (P. 5a Vol. 1 of record).

> "FOURTH: I give and bequeath all the rest, residue and remainder of my estate, real, personal and mixed, of whatsoever kind and nature, and wheresoever situated, to my Executors and Trustees hereinafter named, In Trust Nevertheless, to invest the same and keep the same invested, and after deducting the proper charges against the said trust estate and a reasonable compensation for their services, to pay out of the net income thereof as follows:—(1) To Mary A. Kelly the sum of Seven Thousand Dollars monthly so long as she shall live, free and clear of any and all her debts, contracts or engagements, and after her death the principal of the said estate, upon which she has been receiving the said monthly sum, shall become a part of my residuary estate. (2) To establish and maintain an Asylum for

the deaf, dumb and blind to be known as the 'Nevil Asylum for the Deaf, Dumb and Blind' the said net income to be allowed to accumulate until (it) reaches a sum sufficient, in the judgment of the Executors and Trustees, to establish and maintain such asylum and the support of the same thereafter to be paid out of the income."

"All the bequests, legacies and devises herein contained are to be free from any and all taxes lawfully imposed or to be imposed by the United States Government or any State Government or any municipal authority thereof, which taxes are to be paid by my estate."

He was the last to die of five brothers and one sister, all of whom had resided together, and as each one died his or her property had passed to those still living. The estate exceeded $4,800,000. None of them had ever married or had issue. Mary K. Ellis was brought into the household when a little girl by her aunt who managed the household of the Nevil family. The child lived in the household thereafter and was supported by them and reared for over thirty-five years as though she was their natural child. They referred to her as their ward and were devoted to her. She called them "Uncle" and "Aunt", and was devoted to them. The decedent had bought for her two large estates—one in Haverford, Pennsylvania, and one in Ventnor, New Jersey. There they resided. He had numerous servants who had been with the family many years. He kept several automobiles.

Evidence was offered in the Court below that he had arranged his affairs so that she could do as he wished, to wit: to maintain this scale of living and go on living as they did prior to his death, maintaining the properties, retaining the help, etc., and that she had agreed with him so to do. Evidence was offered to show that he figured it would cost about seven thousand dollars a month to so do

(Record Vol. 1, Pp. 117a and 121a) and he therefore so provided in his will. Evidence was also offered in the lower Court that he did not know what to do with his estate after Mrs. Ellis' death, as he had no near relatives, and the Home idea was a sudden one suggested by his attorney because both he, the said attorney, and the testator were gradually becoming deaf. Evidence was offered that he had then said he was not interested after Mrs. Ellis' death, as she was all he had. A large part of his testimony so offered was rejected by the trial Judge.

Testimony was offered that the testator had paid no income tax prior to his death because he had practically all of his estate invested in exempt municipals, and that in calculating the amount he wished Mrs. Ellis to have he expected it to be likewise free of any such tax. To make sure that the seven thousand dollars a month was not reduced by any taxes he used the broadest language possible, to wit:—

> "All the bequests, legacies and devises herein contained are to be free from any and all taxes lawfully imposed or to be imposed by the United States Government or any State Government or any municipal authority thereof, which taxes are to be paid by my estate."

And a further careful reading of the will shows that to accomplish this he directed that the fund left to create the seven thousand dollars a month for Mrs. Ellis was not to fall into the residuary until her death. Approximately $1,000,000 income has accumulated and should have been and should be used to carry out his wish—pay her the seven thousand dollars a month and pay any and all taxes imposed or to be imposed. She was the chief object of his bounty. He did not expect his plan to be wrecked as to her and this large fund be accumulated for a charity which he named because he could think of nothing else.

The will was prepared by the Honorable Dimner Beeber, his counsel for years and a very able attorney, who himself had been a member of the Superior Court of Pennsylvania. In the record (Rec. 1-158a) is a statement of the increase in her income tax from the time of his death, caused almost entirely by the shift of the securities comprising the trust from the non-taxables to the taxables. This caused Mrs. Ellis to be deprived of her property without her consent. This change has caused approximately $1,000,000 income to accumulate in the hands of the trustee and thus enure to the advantage of the Home to be formed in the future, in which the testator had only a passing interest. This he did not intend. Mary K. Ellis was the *first* object of his bounty and it was only after his careful provisions for her were carried out and her death that he wished the Home to come in. That is why he directed the fund from which her $7,000 a month was to be derived was to be held intact until her death and that the Home should then get any income. He expected his plans for her and agreement with her to be first carried out and whatever remained would on her death go to the Home. It was also contrary to the agreement between the testator and Mrs. Ellis and contrary to the implied agreement between the testator and the trustee whom testator expected to carry out his wishes so clearly stated—that the seven thousand dollars a month was to be *free and clear of all taxes, imposed or to be imposed by the United States.*

To construe the will other than appellant contends denies the testator his right to make a will, and further his right to dispose of his property as he wished—which rights are guaranteed by the Constitution.

ARGUMENT.

I. Did the Supreme Court of Pennsylvania by Affirming the Action of the Lower Court Deny George W. Nevil (the Testator) and Mary K. Ellis (the Appellant) Due Process Under the 14th Amendment of the Constitution of the United States by Preventing Proof of the Contract Between Said George W. Nevil and Said Mary K. Ellis (Record Vol. 1, P. 140a) and Thus Deny the Parties a Fair Hearing?

The testimony offered clearly shows there was an agreement between the testator and Mrs. Ellis as to the amount it would require to carry out his wishes, and that he would provide that amount by his will; and that in order to do so he provided there should be no diminution of it by any kind of taxes. He made the tax clause as broad as any man could do—not naming *any* specific kind of taxes, because by doing so he knew it might limit rather than enlarge the taxes he had in mind. He knew there were income taxes and he knew that they reduced materially one's income. He knew taxes were subject to change and had been changed from time to time. He further knew there had been an excess profits tax. How, therefore, could he otherwise express his wishes than by saying "*any and all taxes*" and "imposed and to be imposed"? That he had in mind more than estate and inheritance taxes is further clearly shown by his use of the words "any municipality", as estate and inheritance taxes are only levied by the United States or a State. He meant exactly what he said "any and all".

There being doubt in the mind of the auditing judge as to the intent of testator as expressed in his will appellant felt it necessary to offer evidence of the facts leading to and surrounding the making of the will. Such was done, but the auditing judge refused the admission of much of

it. Its action was erroneously affirmed by the Supreme Court of Pennsylvania.

This constituted a denial of due process guaranteed to the appellant by the Fourteenth Amendment to the Constitution because it prevented the proof of a contract by the testator and appellant and that the provisions of the will were pursuant to that contract, which action amounts to the denial of a fair hearing. In *Saunders v. Shaw,* 244 U. S. 317; and *Georgia Railway and Elec. Co. v. Decatur,* 295 U. S. 165-171, your Honorable Court held the refusal of a State Court to admit evidence may deny due process guaranteed by the Fourteenth Amendment.

II. Did the Supreme Court of Pennsylvania by Affirming the Decree of the Lower Court Illegally Interfere With the Contract Rights of the Parties and Thus Deny the Parties Due Process Under the Said Amendment to the Constitution?

III. Did the Supreme Court of Pennsylvania by Affirming the Decree of the Said Court Below Deny George W. Nevil and Said Mary K. Ellis Due Process Under the 14th Amendment to the Constitution of the United States by Impairing Contract Obligations Between Said George W. Nevil and Said Mary K. Ellis, and Said George W. Nevil and the Trustee Under His Will for the Benefit of Mary K. Ellis, the Beneficiary?

Your Honorable Court held in *Morehead v. N. Y.,* 298 U. S. 587, 610; *Buchanan v. Worley,* 245 U. S. 60, 70; and *Terrence v. Thompson,* 263 U. S. 197, 215, that among the property rights protected by the 14th Amendment was the right to contract and to so dispose of his property. The action of the Supreme Court of Pennsylvania and the lower Court denied the right of the parties to contract and therefore constituted a denial of due process, and should be set aside.

See also *Avondale v. Sovereign Camp,* 134 Net. 717, and cases therein cited particularly *Home Ins. Co. v. Dick,* 281 U. S. 397, *Hartford Ins. Co. v. Delta Pine Land Co.,* 292 U. S. 143.

The Pennsylvania Courts have continually held that a contractual relationship can exist between a testator and a beneficiary who rendered services in consideration of being named a beneficiary under the will, and between a testator:

McGinley's Estate, 257 Pa. 478;
Edmundson's Estate, 259 Pa. 429;
Van Meter v. Morris, 318 Pa. 137;
Kocher's Estate, 354 Pa. 81;
Cramer v. McKinney, 355 Pa. 202.

IV. Did the Supreme Court of Pennsylvania by Affirming the Decree of the Court Below Deny the Due Process Guaranteed by the 14th Amendment to the Constitution by Taking Mary K. Ellis' Property (Money and Contract Rights) and Giving the Same to the Trustee or the Charity or the Government Without Just Cause?

The will clearly shows that the testator wished the seven thousand dollars a month to be "free from any and all taxes lawfully imposed or to be imposed by the United States Government or any State Government or any municipal authority thereof, and such taxes were to be paid by my estate."

If testator had meant merely estate or inheritance taxes, he would have said so. He went further; he said "taxes lawfully imposed or to be imposed by the United States Government or any State Government *or any municipal* authority thereof." He well knew only the United States and the States could impose estate and inheritance taxes and that a municipal authority could not impose that kind of a tax. He was an intelligent man who had a large fortune and knew the effect of taxes. We must concede that he meant what he said. By not paying the tax, it reduced the seven thousand dollars a month to her and increased

the amount for the Home—which he did not wish and would not have had.

V. Did the Supreme Court of Pennsylvania by Affirming the Decree of the Lower Court Deny the Testator His Right to Lawfully Dispose of His Property in Any Manner He Wished?

VI. Did the Supreme Court of Pennsylvania Deny the Said George W. Nevil His Inalienable Right to Make a Will Disposing of His Property as He Wished?

Testator wished to make sure the beneficiary would net seven thousand dollars a month for herself. He therefore said "any and all taxes" and "imposed and to be imposed." The Court below, however, has read into his will something that is not there and something he did not intend. The testator said "any and all taxes lawfully imposed or to be imposed." The Court below in its majority opinion practically says that phraseology merely means "imposed at date of decedent's death." Testator did not say that. He said "lawfully imposed or to be imposed." He was a man of sound mind and knew what he was doing. He was creating a trust that he well knew would probably run for years after his death and that old taxes were changed and new ones imposed. To make sure that all taxes in force at his death or thereafter imposed were intended he says as aforesaid "any and all taxes lawfully imposed or to be imposed". That is what he meant and any construction otherwise violated his right to make a will and dispose of his estate as he wished, and constituted a violation of the 14th Amendment. There was no dispute as to the testator's competency, nor was his wish illegal. He was an educated man of large affairs. He well knew that ordinarily in the absence of express words to the contrary only the inheritance or estate tax laws in effect at his death would affect his estate. That is why he said "any and all taxes imposed or to be imposed". He wishes to cover all taxes imposed then or thereafter, during the life of the trust.

He further knew income tax laws could and would be changed from time to time and they might affect the annual payments to Mrs. Ellis. For that reason he used the phraseology he did.

What more could he do? What more could he say?

He directed the fund from which her $7,000 a month was to be derived (which was the entire residuary estate) to be held intact *until her death* and then to create the fund for the Home. We must concede that he had a reason for this, and that the reason was to make sure of Mrs. Ellis' having $7,000 a month free and clear of any and all taxes lawfully imposed or to be imposed by the United States Government or any State Government or any municipal authority thereof and that all such taxes were to be paid by the estate.

The Supreme Court of Pennsylvania in its majority opinion held he was only referring to estate or inheritance taxes.

His use of the words "any and all taxes" clearly shows he did not. He meant just what he said.

Furthermore, that the testator had in mind other than estate and inheritance taxes is evidenced by his use of "any municipal authority". **No municipal authority ever imposed an estate or inheritance tax. It cannot in Pennsylvania. Therefore he must have had other taxes in mind.** This shows beyond any doubt that the testator must have been thinking about other taxes. He knew that a municipal authority might impose a tax of some kind—not necessarily estate or inheritance tax—that would affect the net amount the beneficiary would have of the $7,000 a month. **To avoid any such question and make his provision all-inclusive he said, as heretofore stated, "Any and all taxes lawfully imposed or to be imposed by the United States Government or any municipal authority thereof," ~~he used the phraseology he did.~~ How else could he say it?**

To do anything in any way that would limit the meaning of the words the testator used would amount to a read-

ing in the will of something testator did not intend, and as heretofore stated deprive him of his right to dispose of his property as he wished and the beneficiary of her right to the full $7,000 a month. To do so violated the 14th Amendment to the Constitution.

The Supreme Court of Pennsylvania referred to the difficulty calculating the tax as a reason for its majority opinion.

Does the fact that the result of the appellant's contention would cause difficult accounting justify the Supreme Court of Pennsylvania in denying the testator his right to dispose of his property as he wished?

The answer is no; the testator had the right to dispose of his property as he wished. The burden of calculation would fall on the trustee, who accepted the trust and was and would be compensated therefor.

The calculation would not be impossible. All one had to do was ascertain the income tax imposed on her whole income ~~allowance to~~ this $84,000 a year and pay the sum so imposed in the first instance (as Judge Halloran said in *Williamson's Estate,* hereafter cited). This would satisfy the appellant, and the will of the testator would be carried out.

As heretofore stated the testator said he wished Mrs. Ellis to have the $7,000 a month and any and all taxes that would affect it were to be paid out of the estate. It might be difficult of computation. It is not impossible. To be difficult is no excuse. The estate provided the trustee was to have "reasonable compensation" and they should therefore not complain.

Judge Ladner in his dissenting opinion cites *Van Beil v. Brogan,* 65 Pa. Supr. Court 384 in support of his finding that the lower Court erred and should be reversed.

There is also the case of *Williamson's Estate,* 61 Montgomery L. R. 242, where the testator gave his wife the annual sum of eight thousand dollars during the period of her natural life, or until she remarries, "* * * I direct

that the said income of eight thousand dollars shall be payable to the said Ella A. Brown Williamson net and free from all liability for taxes, or charges of any character, which said taxes or other charges, if any, shall be payable out of my residuary estate." There the Court said:

> *"We can only consider the exact meaning of the words used and they are so all-inclusive as to make it impossible to come to any conclusion but that any possible tax that would be a charge or encumbrance on the income is payable out of the residuary estate of the decedent. The testator employs every possible word available in the language and with the choice of the strongest to indicate his intentions. * * * Furthermore, when we consider that this annuity constitutes income and that the primary and essential tax on income is an income tax,* it seems convincing that he intended tax on this sum to be paid out of the residue and we so hold. The practical manner to make the calculation of the amount due the annuitant is to ascertain each year the amount of income tax imposed on her whole income that is allocable to this $8,000, and pay that sum so imposed *in the first instance and that sum alone, in addition to the total of $8,000."*

This case is in point, and certainly answers the reasoning of the Supreme Court of Pennsylvania and in every point.

In the case at bar the testator clearly states his wish. The Supreme Court of Pennsylvania has denied him his right so to do. Your Honorable Court should reverse it and direct the wish of the testator to be carried out—which can easily be done, as set forth in *Williamson's Estate* aforesaid.

This case has attracted widespread interest. Tax Magazines, Law Reviews, Booklets issued by trust companies on making wills and even newspapers have given the same write-ups. **It is important therefore that the questions submitted be decided.**

CONCLUSION.

For the foregoing reasons the appellant claims

(1) That the testator by using the comprehensive language that he did intended exactly what he said, to wit; the beneficiary should have the $7,000 a month free from *any and all taxes* lawfully imposed or to be imposed by the United States Government or any state Government or any municipal authority thereof, which taxes were to be paid by his estate.

(2) That the Supreme Court of Pennsylvania has by its action in this case deprived her of the due process of law guaranteed by the 14th Amendment to the Constitution of the United States.

(3) That the testator was also deprived by the Supreme Court of Pennsylvania of due process of law guaranteed by the 14th Amendment to the Constitution.

(4) That the Supreme Court of Pennsylvania has read into the testator's will something that does not appear therein.

(5) The Supreme Court of Pennsylvania by its decision has deprived a testator from disposing of his property as he wished and making a will as he wished.

(6) The action of the Supreme Court should be set aside and a decree entered holding that the Trustee must reimburse appellant for the income taxes to date caused by the $7,000 a month legacy and hereafter pay the income and any other taxes caused thereby, imposed or to be imposed by the United States, any state or municipality thereof.

Respectfully submitted,

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WILLIAMSON'S ESTATE.

(Orphans' Court of Montgomery Co., Pa.)

(Reported 61 Mont. (Pa.) 242.)

Wills—Construction—Taxes—Direction to pay from residue—Federal estate tax on property not passing through estate—Income tax on annuity.—

1. Testator directed that "all estate, inheritance and/or succession taxes payable by the Executors of this my Will, or may be assessed upon or chargeable upon any annuity, legacy, absolute, for life or a lesser period, shall be paid out of my residuary estate, . . ." The widow received certain insurance payable directly to her. Held: that the federal estate and Pennsylvania additional estate tax proportioned to the amount of the insurance so received were payable out of the residuary estate.

2. Testator made the criterion of the tax to be paid out of the residue depend upon whether the tax was "payable by the executors".

3. Testator gave his wife an annuity "net and free from all liability for taxes, or charges of any character, which said taxes or charges if any, shall be payable out of my residuary estate." Held: that the income tax assessed against the annuity shall be paid out of the residue.

O. C. MONTGOMERY COUNTY. No. 49,108. First and final account of WILLIAM C. WILLIAMSON and Girard Trust Company, executors: Estate of John D. Williamson, Jr., deceased.

Samuel H. High, Jr., of High, Swartz, Flynn & Roberts, and Thomas M. Hyndman, for accountants.

James Herbert Egan and Carlyle H. Ross, for Ella A. Brown Williamson, widow and annuitant.

HOLLAND, P. J., May 11, 1945:—The record facts, the terms of the will, the identity of the interested parties and the proportions of their respective interests are all shown in the petition for adjudication. All interested parties survived the testator, are living, of age, and sui juris.

The supplemental account presented at the audit shows a combined balance of principal and income personalty in the sum of $357,214.82, composed as shown on the second to fourth inclusive pages of the said supplemental account.

All transfer inheritance tax due the Commonwealth has been paid.

In the inventory there is an item in the sum of $1789.67, indicated as a receipt from Fidelity-Philadelphia Trust Company, trustee under the will of George W. Williamson, deceased, due decedent's estate under an assignment of William C. Williamson, 3rd. By letter hereto attached, Girard Trust Company indicates that this item should be described as coming to the estate under an assignment of George W. Williamson, 3rd. The same item appears in the account on page 14, and in the supplemental account on page 4. The record is accordingly corrected to the effect that this assignment is by George W. Williamson, 3rd, instead of by William C. Williamson, 3rd.

In paragraph 11 (a) of the petition for adjudication is indicated various sums which have been paid to

decedent's widow, son, daughter, and grandchildren specifically named therein, from insurance payable directly to them. The query is submitted as to whether these insurance beneficiaries are liable for the payment of the federal estate tax and Pennsylvania additional estate tax proportioned to the amounts received by them, or whether all of these taxes are payable out of the residuary estate under the twelfth clause of the will, which reads as follows: "TWELFTH. I direct that all estate, inheritance and/or succession taxes payable by the Executors of this my Will, or may be assessed upon or chargeable upon any annuity, legacy, absolute, for life or a lesser period, shall be paid out of my residuary estate, and I authorize my Executors, if they deem best, to pay all such taxes prior to or at the time of the settlement of their account so that the ultimate remainders may be free of such taxes upon vesting in possession."

The language used in this clause of the will is so all-inclusive that we cannot escape the conclusion that he intended these taxes to be paid out of the residue. They come within the description of "estate, inheritance, and/or succession taxes," and are "payable by the executors of this my will." There might be some doubt if he had referred to the taxes payable only on annuities or legacies or some such other item that could be only in a will, but he makes the criterion of the tax to be paid out of the residue as to whether it is "payable by the executor". Obviously all these estate taxes are charged in the first instance against the executor or executors and they have to pay them. We see no other conclusion, therefore, than that the taxes which the executors have to pay on the insurance are to be paid out of the residue, and we so hold.

The question is submitted as to whether under clause Fifth A (1), income tax assessed against the

annuity in favor of the widow therein provided is to be payable out of the estate.

The item of the will is as follows: "FIFTH. A. (1) To pay to my wife, Ella A. Brown Williamson, if she should survive me, the annual sum of Eight Thousand Dollars ($8,000.00) during the period of her natural life, or until she remarries, payable in quarterly payments of Two Thousand Dollars ($2,000.00) each, in lieu of all dower and other interest, right and title whatsoever, in exact accordance with a Pre-Nuptial Agreement entered into and executed by the said Ella A. Brown with me, the said John D. Williamson, Jr., under date of the Twenty-third day of January, 1929; I direct that the said income of Eight Thousand Dollars ($8,000.00) shall be payable to the said Ella A. Brown Williamson net and free from all liability for taxes, or charges of any character, which said taxes or other charges, if any, shall be payable out of my residuary estate."

The language of the pre-nuptial agreement referred to in this item purporting to exempt the income from any taxes or charges is precisely the same as the language contained in the item of the will.

Here again, we can only consider the exact meaning of the words used and they are so all-inclusive as to make it impossible to come to any conclusion but that any possible tax that would be a charge or encumbrance upon the income is payable out of the residuary estate of the decedent. The testator employs every possible word available in the language and with the choice of the strongest to indicate this is his intention. He directs that the $8,000 per year shall be payable to his wife "net and free", from "all liability for taxes, or charges of any character." Certainly the

income tax on the $8,000 is a tax "of any character," or we might say it is a tax that has a particular character of its own and comes within the general category. Furthermore, when we consider that this annuity constitutes income and that the primary and essential tax on income is an income tax, it seems convincing that he intended tax on this sum to be paid out of the residue, and we so hold. The practical manner to make the calculation of the amount due the annuitant is to ascertain each year the amount of income tax imposed on her whole income that is allocable to this $8,000, and pay that sum so imposed in the first instance and that sum alone, in addition to the total of $8,000.

Subject to the disposition of the questions submitted, the net ascertained balances of principal and income are awarded as suggested in the last paragraph of the petition for adjudication.

All awards are subject to distribution heretofore properly made.

The account and supplemental account are approved, and it is ordered and decreed that Girard Trust Company and William C. Williamson, executors as aforesaid, forthwith pay the distributions herein awarded.

Counsel for accountants shall file a schedule of distribution in duplicate.

And Now, May 11, 1945, this adjudication is confirmed nisi.